ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	
the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

COMMENTS OF VIACOM INC.

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018

TABLE OF CONTENTS

Page

SUMMARY

The Telecommunications Act of 1996 (the "1996 Act") has dramatically altered the options available to local exchange carriers ("LECs") for entering the video programming marketplace. Whether the Act's one newly created option -- "Open Video Systems" ("OVS") -- emerges as a viable vehicle for LEC entry into video distribution remains very much in the hands of the Commission. Indeed, if OVS is ever to be a significant factor in the marketplace, the Commission must give LECs the flexibility necessary to make the creation and operation of Open Video Systems an attractive option.

As a programmer, Viacom is keenly interested in making full use of all possible forms of distribution methods to deliver its program content to subscribers. Furthermore, Viacom agrees with the Commission that lawmakers sought to preserve in OVS the best features of a non-discriminatory video transmission medium designed to promote the dual goals of "inter-system" and "intra-system" competition while also eliminating many of the regulatory burdens that hampered "video dialtone" deployment. Thus, Viacom believes that the potential benefits of OVS -- for content providers and consumers alike -- should not be discounted. An Open Video System obviously could provide significant competition to rival video transmission systems. But by also providing unaffiliated program packagers some real measure of open access to the system (whether a program packager offers only its own services or a combination of

various programmers' services), OVS would add a competitive check on the system operator's ability to take unfair advantage of its control over the transmission facility.

Thus, while the OVS regulatory scheme must afford unaffiliated programmers and program packagers non-discriminatory access to -- and fair treatment on -- Open Video Systems, Viacom urges the Commission to implement rules that will encourage the establishment and viability of OVS. As detailed below, Viacom advocates adoption of a broad prescriptive approach, coupled with the certainty of elective "safe harbor" approaches to compliance, in regulating access to Open Video Systems. Once rival packagers secure carriage, however, they must be protected by minimal safeguards to ensure (1) that all packagers enjoy a fair opportunity to compete for and serve subscribers, and (2) all programmers are able to maintain control over licensing of their program services to packagers.

Specifically, Viacom suggests that the following steps be taken:

- The Commission should authorize telecommunications entities other than telephone companies - expressly including cable operators -- to offer service as (or transform themselves into) OVS operators, but in all events consistent with their existing program licensing obligation.

- The agency should establish general non-discrimination obligations that ensure unaffiliated packagers fair access to an Open Video System, while affording OVS operators reasonable discretion to determine the most viable -- yet still effective -- means to satisfy the broad prescriptions. More specifically, the Commission should:

  -- Allow OVS operators reasonable discretion in meeting the general obligation to ensure non-discriminatory allocation of analog channels.

  -- In accord with the pro-competitive intent of the statutory prohibition on telco/cable "buy-outs" or joint ventures, preclude the incumbent local cable operator from taking analog capacity on an Open Video System

unless such capacity is unclaimed by either OVS-affiliated or unaffiliated program packagers.

-- Permit an OVS affiliated packager to control and retain more than the statutory one-third channel cap where no excess demand for initial capacity arises

-- Exclude local broadcast channels and all "shared" channels from being counted against the statutory cap on the OVS-affiliated packager's use of system capacity.

-- Allow an OVS operator, to the extent consistent with all relevant program licensing agreements, to "co-package" the programming selected by its affiliate with program services provided by an unaffiliated program packager.

-- Permit an OVS operator limited discretion in establishing a non-discriminatory rate structure to be applied to affiliated and unaffiliated program packagers alike.

- Once unaffiliated packagers secure access to an OVS network, the Commission should provide minimal safeguards to ensure that unaffiliated entities are treated in a non-discriminatory fashion. Thus, the agency should:

  -- Fashion rules governing channel sharing that respect the rights of a programmer to control the licensing of its programming services and afford a fair competitive opportunity for rival program packagers.

  -- Require non-discriminatory access to the interfaces -- including set-top boxes, other navigational devices, and any programming menus -- between the subscriber and all programming services offered on an Open Video System

- The Commission should, within its limited discretion in implementing must-carry/retransmission consent rights for local broadcasters, require OVS operators to employ channel sharing of broadcast signals in a manner that maximizes the viability of Open Video Systems.

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Viacom Inc. ("Viacom") hereby submits its comments on the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding,[1/] which seeks to craft an "Open Video Systems" ("OVS") regulatory framework as called for by Section 302 of the Telecommunications Act of 1996 (the "1996 Act").[2/] From its fundamental perspective as a programmer,[3/] Viacom believes that the combination of inter-system and intra-system

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[1/] Report and Order and Notice of Proposed Rulemaking, CS Docket No. 96-46, FCC 96-99 (released March 11, 1996).

[2/] Pub. L. No. 104-104, 110 Stat. 56 (approved February 8, 1996). The 1996 Act adds a new Section 653 to the Communications Act, 47 U.S.C. § 151 et seq., to authorize OVS, and hereafter these comments will refer to the OVS statutory provision as "Section 653."

[3/] For the purposes of this pleading, Viacom uses the term "packager" or "program packager" to refer to any entity which seeks to provide programming on a retail basis to subscribers through an OVS facility, regardless of whether that packager offers only one program service or a collection of several services. These comments use the terms "programmer" to mean the entity that licenses program material to a packager, the term "OVS operator" to refer to the entity that controls and operates the transmission facility, and the term "OVS-affiliated packager" to mean that packager entity owned by or affiliated with the OVS operator.

competition contemplated by the OVS framework would afford consumers and program providers alike significant benefits in the multichannel video marketplace.[4/] Given the other alternatives now available to local exchange carriers ("LECs") for entering the video marketplace, however, OVS could be rendered a dead letter by unnecessarily rigid implementing rules. Viacom therefore urges the Commission to structure its regulations in a manner that allows LECs -- and any other telecommunications entity interested in offering

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[4/] Viacom, a diversified entertainment and communications company, has substantial programming and related interests that would be directly affected by the implementing rules established by the Commission for OVS. The company's MTV Networks division ("MTVN") owns the advertiser-supported program services MTV: Music Television, VH1, and Nickelodeon (comprised of the Nickelodeon and Nick at Nite programming blocks). Viacom's wholly-owned subsidiary Showtime Networks Inc. ("SNI") owns the premium program services Showtime, The Movie Channel, and FLIX, and Viacom's wholly-owned subsidiary MTV Latino Inc. owns the advertiser-supported program service MTV Latino, which is distributed domestically and to Latin American territories. In addition, Viacom (through its wholly-owned subsidiaries, or through affiliated entities) holds partnership interests in several other program services, including Comedy Central, USA Network, Sci-Fi Channel, All News Channel, and Sundance Channel. Viacom also owns Showtime Satellite Networks Inc., which licenses the SNI, MTVN, and a variety of third-party program services to owners of home television receive-only earth stations nationwide.

Through its subsidiary Paramount Stations Group, Inc., Viacom operates 12 television stations located in Boston, MA; Miami, FL; Houston and Dallas, TX; Washington, D.C.; Detroit, MI; Philadelphia, PA; Atlanta, GA; St. Louis, MO; Albany and Rochester, NY; and Hartford, CT.

Further, Viacom is engaged in a number of other businesses, including: radio broadcasting; the production and licensing of syndicated and network television programming and interactive media; the production, distribution and exhibition of theatrical motion pictures; the retail distribution of music and video cassettes; the ownership and operation of amusement parks; the publication and distribution of education, business and trade books; the production and distribution of educational television programming and interactive media; and the licensing and merchandising of its trademarks.

OVS -- reasonable flexibility consistent with the non-discriminatory foundation established by Congress.

I. VIACOM SUPPORTS DEVELOPMENT OF FCC RULES THAT MAKE OPEN VIDEO SYSTEMS A GENUINELY ATTRACTIVE ALTERNATIVE FOR LOCAL EXCHANGE CARRIERS

Where once telephone companies faced strict limits on their direct participation in the distribution of video programming, the 1996 Act now affords LECs a host of opportunities.[5/] All but one of these options present LEC business strategists with established regulatory frameworks for providing multichannel video services. Only the concept of Open Video Systems represents uncharted territory, and whether this new OVS terrain will ultimately entice telco explorations remains very much in the hands of the Commission.

The tensions which the FCC must reconcile to implement a viable and effective OVS framework are undeniable. Section 653 of the Act clearly incorporates certain terminology and concepts rooted in Title II common carrier regulation, while at the same time the framers of these provisions have rejected the FCC's "video dialtone" ("VDT") rules and, indeed, any strict common carrier foundation for OVS.[6/] Yet Viacom agrees with the Commission that lawmakers also clearly sought to preserve in OVS the best features of a non-discriminatory

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[5/] Notice at ¶¶ 1-3 (describing Title VI cable and traditional common carriage service for independent program packagers).

[6/] Accord Notice at ¶¶ 4-5.

video transmission medium intended to "promote the dual goals of both inter-system competition . . . and intra-system competition" -- while eliminating many regulatory burdens that hampered deployment of VDT systems.[7/]

As a programmer, Viacom believes that the public interest benefits in such a "dual competition" framework should not be lightly discounted. As the record in many Commission proceedings documents,[8/] Viacom has consistently urged the development and growth of all possible technologies and methods for the delivery of video programming to consumers. Competition among transmission facilities would create the greatest number of viable links between consumers and programmers -- thus expanding the program choices available to consumers while also maximizing programmers' service to subscribers (and their ability to achieve fair licensing terms from program packagers).

The 1996 Act reflects a clear recognition of those benefits on the part of Congress. Particularly in its restrictions on telco buy-outs of local cable systems, the statute embodies a Congressional policy favoring a vigorously competitive "two-wire" world. Whether or not the economics of the dynamic and unpredictable communications marketplace will ultimately support full, widespread two-wire competition, the Act's complementary creation of an OVS model could foster and support wire-based video competition in any event. Thus, if established as a viable entry option, OVS clearly could offer the maximum opportunity for

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[7/] Notice at ¶ 10.

[8/] See, e.g., Reply Comments of Viacom Inc., MM Docket No. 87-268 (filed Jan. 22, 1996) (Advanced Television); Comments of Viacom Inc., CC Docket No. 87-266 (filed Mar. 21, 1995) (Video Dialtone).

some form of long-term wireline competition among rival video service providers. Moreover, by providing unaffiliated program packagers some real measure of open access to consumers, the OVS framework would limit the ability of an OVS operator to take unfair advantage of its control over the transmission medium -- and thus deliver on the 1996 Act's promise of providing consumers the broadest possible choice among communications service offerings.

Because "an entirely new framework" must be developed for OVS,[9] however, its appeal to LECs -- and other potential OVS operators -- will be determined in large measure by the manner in which the Commission implements this broad statutory model. Bearing in mind the established and reasonably attractive alternatives for entry into video distribution now available to LECs, the Commission must undertake a delicate balancing act in devising its OVS rules.[10] The regulatory scheme must afford independent program packagers nondiscriminatory access to, and fair treatment on, Open Video Systems. Yet if OVS is ever to appear in the marketplace the Commission also must give LECs the flexibility necessary to make the creation and operation of an Open Video System a viable -- and, indeed, an attractive -- option.

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[9] Notice at ¶ 4.

[10] As the Commission recognizes, Congress concluded that "rigid" adherence to common-carrier principles rendered VDT unduly restrictive and thus unattractive. Notice at ¶ 5; Conference Report at 63. Lawmakers explicitly directed that OVS should be characterized by "reduced regulatory burdens" and not be subject to Title II requirements. Conference Report at 62-63 (stating that rules and regulations "under [T]itle II should not be merged or added to the rules and regulations governing open video systems, which will be subject to new [S]ection 653 not [T]itle II").

In the discussion below, Viacom urges the Commission to adopt rules that will encourage the establishment and viability of OVS. Section II of these comments endorses affording the OVS option to any entity technically capable of transmitting multichannel video services. Section III advocates adoption of a broad and flexible prescriptive approach to the regulations governing access to an Open Video System. Section IV outlines the minimal safeguards necessary to ensure that, once able to offer program services on an Open Video System, rival program packagers will enjoy a fair opportunity to serve and compete for viewers.

II. OTHER TELECOMMUNICATIONS FACILITY PROVIDERS, INCLUDING CABLE SYSTEM OPERATORS, SHOULD ALSO BE ALLOWED TO OFFER OVS

Before turning to the specifics of OVS regulation, Viacom wishes to emphasize that the potential competitive benefits of Open Video Systems do not hinge on the identity of the transmission service provider. The Notice asks whether the Commission can and should permit non-LECs -- including traditional cable operators and any other entity that can provide facilities-based transmission service -- to become OVS operators.[11/] Viacom strongly believes that the OVS option should indeed be available to all facilities-based competitors, including cable operators.

Viacom thus endorses the Commission's tentative conclusion that there would be "significant benefits to permitting cable operators and others to become Open Video System

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[11/] Notice at ¶¶ 64-65.

operators."[12/] Irrespective of who the OVS operator might be, Open Video Systems could offer the benefits of both enhanced programmer access to consumers and enhanced consumer access to diverse programming. The legislation explicitly authorizes the Commission to offer the OVS option to other entities,[13/] and doing so would not only fulfill Section 653's goals of "enhancing competition and maximizing consumer choice" but in fact would comport with the pro-competition and regulatory parity tenets of the 1996 Act as a whole.

III. OVS OPERATORS SHOULD BE AFFORDED REASONABLE FLEXIBILITY TO DEVISE APPROPRIATE METHODS FOR PROVIDING UNAFFILIATED PROGRAMMERS AND PACKAGERS NONDISCRIMINATORY ACCESS TO AN OPEN VIDEO SYSTEM

As noted above, the emergence and viability of OVS in the multichannel marketplace will hinge directly on whether LECs and other potential OVS operators are afforded sufficient flexibility to make Open Video Systems an attractive business option. To insist too strictly on securing the most broadly conceived notion of "open" access imaginable from OVS would be ultimately self-defeating. It should therefore be a Commission priority to craft OVS rules that allow for the operation of a competitively viable package by the OVS-

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[12/] Notice at ¶ 64. A cable operator that chooses to transform its service to OVS should not, of course, be permitted to use that change to abrogate its existing contracts with any of its programmers.

[13/] "To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an [O]pen [V]ideo [S]ystem that complies with this section." 47 U.S.C. § 653(a)(1).

affiliated program packager, while maintaining meaningful access to subscribers for unaffiliated packagers.

To that end, discussed below are certain key elements of OVS that Viacom believes should be subject to a general non-discrimination obligation, with reasonable discretion left in the hands of the OVS operator to determine the most viable -- yet still effective -- means to satisfy the broad fairness prescriptions. The generally flexible approach advocated here will, as the Commission recognizes, require that certain enforcement mechanisms be put in place. To provide OVS operators not only with reasonable flexibility but also the regulatory certainty necessary to proceed with confidence, Viacom suggests that the Commission couple its broad prescriptive rules with some "safe harbor" examples of practices that would be deemed presumptively fair and reasonable. Providing illustrations of alternative approaches (sufficient but not necessary) to ensure compliance would be useful in resolving potential disputes between OVS operators and unaffiliated program packagers seeking carriage -- and thus would likely ease enforcement burdens placed on the Commission's staff.

A. The OVS Operator Should Be Permitted Reasonable Flexibility In Devising Procedures For Fairly Allocating Capacity To And Among Unaffiliated Program Packagers

The Notice seeks guidance on how the Commission can fashion minimally intrusive rules that still provide open access to an Open Video System for unaffiliated program packagers. As suggested above, Viacom would generally support the Commission's proposal

to "adopt a regulation that simply prohibits an [O]pen [V]ideo [S]ystem operator from discriminating against unaffiliated program packagers in its allocation of capacity."[14/]

The OVS operator would thus enjoy reasonable, but not unbounded, discretion in devising a fair enrollment and allocation plan for its system. The Commission could supplement this broad prescription with some minimal guidelines, such as requiring that OVS operators fairly disclose open enrollment periods and the allocation procedures the operator will use if demand for carriage exceeds the system's capacity. Beyond such general prohibitions, however, the Commission should afford the LEC some reasonable latitude to design workable non-discriminatory allocation procedures and provide additional guidance through adoption of a non-exhaustive set of "safe harbor" practices deemed presumptively fair and reasonable. For example, the OVS operator should not be required to allocate more channel capacity to any one unaffiliated program packager than the operator would be allowed to provide to its own affiliated program packager.

The non-discrimination requirement would, of course, have to apply separately to the allocation of analog capacity. This approach will remain a practical necessity at least until digital transmission and digital set-top boxes are deployed to such an extent that programming carried on digital channels is just as accessible to subscribers as programming carried on analog channels. For example, in a situation where demand for capacity exceeds supply, the statutory cap should be deemed to limit the OVS operator's affiliated packager to one-third of the network's analog capacity, measured separately from digital capacity.

[14/] Notice at ¶ 12.

This non-discrimination principle would not logically extend to an incumbent local cable operator who might seek channel capacity on an Open Video System. While a local cable operator should (as urged above) be free to operate its own OVS facility, the 1996 Act's fundamental benefit of inter-system competition would be compromised if the Commission allowed a local cable operator to take capacity on a rival Open Video System. Indeed, the competitive policy underlying the 1996 Act's new statutory prohibition on telco/cable buy-outs and joint ventures would clearly warrant Commission restrictions on an incumbent cable operator in taking capacity on a competing LEC's Open Video System.[15/] At a minimum, such treatment would be justified in cases where analog capacity is oversubscribed and digital capacity cannot provide comparable access to subscribers.[16/] Likewise, in the case where a cable operator opts to proceed under the OVS rules, the LEC should be precluded from obtaining capacity on that OVS facility.

B. The Regulatory Constraints On OVS Channel Allocation Should Not Preclude The Competitive Viability Of An Affiliated Program Packager

The flip side of a light regulatory hand in ensuring fair allocation of capacity for unaffiliated program packagers is an equally light hand in implementing the statutory

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[15/] 47 U.S.C. §652.

[16/] The FCC could appropriately revisit this issue once digital capacity offers subscriber access generally comparable to that of analog, but in doing so the Commission should continue to mandate that no unaffiliated program packager would be entitled to channel capacity beyond that allocated to the OVS-affiliated packager.

constraints on an OVS operator's allocation of capacity to its affiliated packager. OVS networks simply will not emerge if LECs cannot compete with local cable operators nearly as effectively through their OVS affiliated packagers as they could under Title VI or other available modes of entry. And the public would be ill-served by excessive constraints on the ability of OVS-affiliated packager to offer truly effective competition in the video marketplace at large. This understanding should lead the Commission to several key conclusions.

First, Section 653 limits an OVS operator's freedom to program channels only if "demand exceeds the channel capacity of the [operator's] Open Video System."[17/] Consequently, if the OVS operator confronts no excess demand during a reasonable period of open enrollment, the OVS-affiliated packager should be allowed to use capacity beyond the statutory limitation. This principle would apply equally to the initial enrollment period and any subsequent offering of capacity.

Moreover, the certainty required for viable business planning would be undercut if subsequent expansion of, or demand for, capacity would trigger an obligation that any program packager (including the OVS affiliate) relinquish channels it has previously secured. Neither consumers nor programmers would be served by a Commission rule obligating or (explicity or implicitly) permitting the OVS operator to abrogate any program affiliation agreements on this basis. Instead, if the OVS-affiliated packager's use of capacity after initial enrollment exceeds the one-third cap, the operator should be required to make new

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[17/] 47 U.S.C. § 653(b)(1)(B).

capacity available to unaffiliated program packagers on a fair and reasonable basis -- perhaps by limiting the OVS-affiliated packager to no more than one-third of any new capacity if oversubscription recurs.

Viacom also agrees with the Commission that any PEG and broadcast must-carry obligations imposed on an OVS operator should not be counted against the one-third cap on operator "selection" of capacity.[18] It is Congress, not the OVS operator, which has "selected" these program services for mandatory carriage. For similar reasons, as discussed below, Viacom urges the Commission not to include any shared channels within the cap on channels "selected" by the OVS-affiliated packager.[19]

Furthermore, Viacom agrees with the Commission's tentative conclusion that Section 653 does not -- and the Commission should not -- bar an OVS operator or its affiliated packager from marketing to subscribers additional channels that have been "selected" by unaffiliated program packagers.[20] To the contrary, the 1996 Act specifically provides that "nothing" in the statutory provision "shall be construed to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers."[21] It is therefore appropriate to allow various program packagers, including the OVS operator's affiliate, to make "co-packaging" agreements that would present consumers with the choice of

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[18] Notice at ¶ 19.

[19] See infra Section IV.A.

[20] Notice at ¶ 27.

[21] 47 U.S.C. § 653(b)(1)(B).

subscribing to various packages jointly or separately -- so long as the program packagers and especially the programmers involved freely choose to enter into such agreements. As the Commission has recognized, such an approach could enhance the ability of both the OVS operator and unaffiliated program packagers to compete effectively in the video marketplace.[22/]

C. OVS Operators Should Be Allowed Limited Discretion In Structuring Carriage Rates, Terms, And Conditions That Do Not Discriminate In Favor Of The OVS-Affiliated Packager

Viacom agrees with the Commission's tentative conclusion that the 1996 Act requires some less stringent form of rate regulation than the rules that govern common carriage.[23/] Nonetheless, as the Commission notes, the "just and reasonable" and non-discrimination mandates of Section 653 clearly embody the recognition that a discriminatory rate structure would undermine the prospects for any fair intra-system competition. Viacom thus agrees with the minimum approach, suggested in the Notice, that would require an OVS operator to apply to unaffiliated program packagers the same rate structure that is offered (or could be fairly imputed) to its OVS-affiliated packager.

With respect to the Commission's suggestion that an OVS operator "be required to make its contracts with all video programming providers publicly available," Viacom respectfully suggests that any disclosure obligation be tailored to the goal of providing

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[22/] Notice at ¶ 27.

[23/] Notice at ¶¶ 29-30.

program packagers with sufficient information to verify that they are not "being harmed by rates, terms or conditions that do not comply with the 1996 Act."[24/] It would, therefore, be appropriate to keep a check on rates by requiring that OVS operators disclose to a program packager the rate structure and/or specific rates that govern their provision of carriage service to other packagers. The Act makes clear that the non-discrimination obligation applies to the rates the OVS operator charges the program packager for carriage. The Commission's disclosure rules need not, and should not, extend beyond the operator's carriage rates to distinct and potentially confidential and proprietary matters such as licensing agreements (including fee provisions) between any such packager and individual programmers.

IV. CERTAIN MINIMAL SAFEGUARDS ARE NEEDED TO ENSURE THAT, ONCE FAIR ACCESS TO OPEN VIDEO SYSTEMS IS SECURED, OVS OPERATORS DO NOT UNFAIRLY DISADVANTAGE UNAFFILIATED PROGRAMMERS AND PACKAGERS

While the potential for OVS operators to create a viable inter-system competitor requires freedom from unnecessary regulatory constraints, the unique intra-system competitive benefits of OVS would be lost without the limited safeguards set forth below to protect unaffiliated packagers and the program services they offer.

[24/] Notice at ¶ 34.

A. Appropriate Channel Sharing Practices Must Recognize The Primacy Of Each Programmer's Rights To Control The Licensing Of Its Programming

The Commission appropriately seeks to craft guidelines for "channel sharing" that allow for efficient use of Open Video System capacity without infringing on the rights of programmers and fair access of rival program packagers.[25/] Viacom was unopposed to the legitimate use of channel sharing for the purpose of making efficient use of limited analog capacity in the VDT context,[26/] and its position applies equally in the new environment of OVS. In particular, Viacom welcomes the Commission's recognition that nothing in this proceeding should be deemed to "alter or dilute" a programmer's rights to exercise control over its program services, including the freedom "to license or not license their programming for shared use by multiple video programming providers."[27/] This recognition should lead to channel sharing rules that expressly acknowledge that, as the Commission states it, the predicate for any channel sharing is that each program packager who "wants to provide a program service to subscribers that will be carried on a shared channel must first obtain permission from the program service to do so."[28/]

The Commission also should expressly bar OVS operators or their affiliated packagers from attempting to deny a programmer any rights it might have to grant

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[25/] Notice at ¶¶ 36-41.

[26/] See, e.g., Comments of Viacom International Inc., CC Docket No. 87-266 (filed Dec. 16, 1994); Comments of Viacom Inc., CC Docket No. 87-266 (filed March 21, 1995).

[27/] Notice at ¶ 41.

[28/] Notice at ¶ 41.

exclusivity or sublicensing rights to any program packager, including the OVS affiliate. As a related matter, OVS operators should be precluded from extracting such rights or imposing cost-sharing terms in a manner that unnecessarily undermines the potential for intra-system competition from rivals to the OVS-affiliated packager. Furthermore, as the Commission suggests, any authorized channel sharing should in all respects be transparent to subscribers.

Finally, Viacom concurs with the Commission that program services carried on shared channels should not be counted against the one-third statutory cap on the OVS-affiliated packager's use of capacity.[29/] The affiliate should not be deemed to have "selected" any program services transmitted on shared channels because that programming would have been carried on the Open Video System regardless of whether the OVS-affiliated packager had initially selected any of those program services for its own package as well. Interpreting the term "select" otherwise would deny the OVS-affiliated packager a reasonable competitive opportunity to offer a differentiated program package over its allotted channels.

[29/] The same principle should apply to unaffiliated packagers. Consequently, if capacity restraints and allocation procedures lead to a de facto cap on unaffiliated packager channels on any particular OVS facility, any shared channel to which the packager has rights should not count against its channel limitation.

B. Non-Discriminatory Navigational Devices and Channel Menus Are Integral To Ensuring Subscribers Fair Access to OVS Program Offerings Not Offered Within the OVS-Affiliated Package

The Congressional framers of the OVS model expressly mandated specific safeguards to ensure that the access afforded to unaffiliated program packagers did not end with channel capacity on the Open Video System. They sought to ensure genuine and fair access to the subscriber as well, recognizing that meaningful intra-system competition would not otherwise emerge. The Commission should thus impose a broad principle that an OVS operator should not be permitted either to impede an unaffiliated program packager's access to subscribers or otherwise take unfair advantage of its control as system administrator.

Beyond that, however, the Act specifically prohibits an OVS operator from omitting an unaffiliated program packager carried on the system from any navigational device, guide, or menu. Congress was thus explicit in recognizing that meaningful access requires providing all program packagers on an Open Video System fair access to the critical gateways to its subscribers. This specific safeguard -- coupled with the general statutory framework for OVS and the anticipated critical role of channel sharing in these systems -- demonstrates that Congress contemplated the use of a single set-top box (or functional equivalent) as a predicate to operation of an Open Video System.[30/] In particular, this safeguard reflects a Congressional desire to limit the potential frustration of subscribers who

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[30/] Congress used the term "navigational device" in Section 629 of the Act, as well, to describe "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming."

seek ready access to a variety of multichannel video programming sources.[31] By incorporating the 1996 Act's direct mandate for the inclusion and ready accessibility of all program packagers in any navigational device used on an Open Video System, the Commission can and should act to ensure that its OVS safeguards provide a non-discriminatory interface between the subscriber and all packagers offering program services on the Open Video System.

Further, the Act's general OVS non-discrimination provisions, together with its more specific statutory requirement regarding navigational devices, guides, and menus, effectively mandate that program offerings of a non-affiliated program packager must be at least as accessible to subscribers as those program services carried by the OVS operator's affiliated packager. The Commission should thus mandate that non-discriminatory access requires that, from a customer's perspective, a connection through an Open Video System to an unaffiliated program packager is comparable to -- i.e., as transparent as -- connecting with an

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[31] Viacom has urged in other contexts that the Commission take steps to ensure that multichannel video programming distribution systems are open at all points throughout the distribution system, including any terminal equipment (such as the set-top box or their functional equivalent) necessary for subscribers to connect to and receive programming from the network. See, e.g., Reply Comments of Viacom, Inc., MM Docket No. 87-268. As it has asserted on other occasions, Viacom is concerned that the set-top box could develop as an anticompetitive technical barrier that precludes other programming sources from reaching subscribers or requires consumers to purchase a second set-top box in order to access multiple program packagers

affiliated packager in time, cost, and ease.[32] User-friendly "shortcuts" in accessing desired programming should be freely deployed, but only on a non-discriminatory basis.[33]

OVS operators likewise should not be allowed to impede ready access to unaffiliated packagers through consumer equipment subscribers have acquired independently. Newly emerging devices, such as the Starsight technology (in which Viacom holds an interest), are coming to offer consumers enhanced navigational control of available video services through hardware embedded in such consumer equipment as television receivers, video cassette records, or advanced set-top boxes. Whether acquired independently by the consumer or as part of an unaffiliated OVS packager's service offering, such navigational devices should not be rendered useless by the actions of OVS operators. The Commission should, in particular, prevent OVS operators from taking action not otherwise technically necessary (such as stripping out key information stored in the vertical blanking interval of a programmer's signal) that would disable independently-provided navigational devices offering subscribers access to an unaffiliated packager's program offerings.

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[32] For example, an OVS operator should not be allowed to configure its system such that subscribers to an unaffiliated packager must "descend" through multiple subdirectories to reach their desired program package if the OVS-affiliated package can be reached at the first directory level. Likewise, it would constitute an abuse of an OVS operator's position as the administrator of an Open Video System to list its affiliated packager's service offerings more prominently than the offerings of unaffiliated program packagers on a default directory or any other directory screen.

[33] In addition to addressing discrimination against programmers outside an OVS operator's affiliated package the 1996 Act's application to OVS systems of the cable "carriage agreement" rules (47 U.S.C. § 616) is designed to ensure the fair treatment of unaffiliated programmers seeking inclusion in an OVS operator's affiliated package. See 1996 Telecommunications Act § 653(c)(1)(A).